

BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 2005-57-C - ORDER NO. 2006-19  
JANUARY 12, 2006

IN RE:	Joint Petition for Arbitration on Behalf of	)	ORDER DENYING
	NewSouth Communications Corp., NuVox	)	MOTION TO
	Communications, Inc., KMC Telecom V,	)	OVERRIDE AND
	Inc., KMC Telecom III, LLC, and Xspedius	)	ADVISING THE
	[Affiliates] of an Interconnection Agreement	)	PARTIES AS TO
	with BellSouth Telecommunications, Inc.	)	ADMISSIBILITY OF
	Pursuant to Section 252(b) of the	)	CERTAIN TESTIMONY
	Communications Act of 1934, as Amended.	)	

This matter is before the Public Service Commission of South Carolina (“Commission”) on BellSouth Telecommunications, Inc.’s (“BellSouth’s”) motion to overrule the Hearing Officer’s decision of September 9, 2005. Since BellSouth filed its motion, both BellSouth and the Joint Petitioners (“NewSouth Communications Corp., NuVox Communications, Inc. and Xspedius [Affiliates]”) have also asked the Commission to rule on what they described as the “conflict of interest issue”. The conflict of interest issue refers to the question of whether Hamilton Russell, a witness called by the Joint Petitioners, has a conflict of interest which prevents him from testifying in this case. The Commission denies the motion to overrule the Hearing Officer and will address the conflict of interest issue to the extent possible at this point in the proceedings.

### **BACKGROUND**

Hamilton Russell testified in these proceedings as a witness called by the Joint Petitioners.<sup>1</sup> Russell is an attorney licensed to practice in South Carolina. He is a former Vice President of NuVox Communications, Inc. (“NuVox”), one of the Joint Petitioners in these proceedings, who is currently employed by the law firm of Nelson Mullins Riley & Scarborough, LLP (“Nelson Mullins”). Nelson Mullins represented BellSouth in various matters in South Carolina during the pendency of these proceedings, and as of August 15, 2005, it represented both BellSouth and NuVox in certain matters.<sup>2</sup> BellSouth’s Memorandum in Reply to Joint Petitioners’ Response to BellSouth’s Motion to Strike, at p. 11, and Exhibit C (setting forth various appearances by Nelson Mullins on behalf of BellSouth); letter from Kenneth L. Millwood, Esq. to the Commission, dated August 11, 2005.

The sequence of events giving rise to this controversy is set out below.

- On May 11, 2005, Russell submitted prefiled direct testimony on behalf of the Joint Petitioners. Russell identified himself as the Vice President, Regulatory and Legal Affairs of NuVox. In his direct testimony Russell stated: “The purpose of my testimony is to offer support for the Joint Petitioners’ Position, as set forth with respect to each unresolved issue subsequently herein, and associated contract language on the issues indicated in the chart above.” Direct Testimony of the Joint Petitioners, p. 10.
- On May 18, 2005, Russell accepted employment as an attorney with Nelson Mullins.
- On May 23, 2005, Russell gave rebuttal testimony in this case. He again identified himself as the Vice President, Regulatory and Legal Affairs for NuVox. Rebuttal Testimony of the Joint Petitioners, p. 5. He stated “The purpose of my testimony is to offer support for the CLEC Position, as set forth herein, and

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<sup>1</sup> On May 27, 2005, KMC Telecom III, L.L.C. and KMC Telecom V, Inc. filed a Notice of Withdrawal with Prejudice from these proceedings.

<sup>2</sup> Nelson Mullins has not represented either BellSouth or NuVox in the instant proceedings.

associated contract language issues indicated in the chart above by rebutting testimony provided by the various BellSouth witnesses.” Rebuttal Testimony of the Joint Petitioners, p. 6. He did not mention that he had accepted a position with Nelson Mullins.

- On June 1, 2005, Russell testified before the Commission in the hearing held in this matter. He introduced his testimony as follows: “Good morning, Mr. Chairman and Commissioners. I’m here on behalf of NuVox Communications. We’re headquartered in Greenville, South Carolina. We’ve been operating here since we received Commission approval in 1998. We have 750 employees here in South Carolina. We’re invested in \$21 million in this state, have 60,000 access lines here.” Hearing Tran., pp. 15-16. On the same date, the Joint Petitioners also filed an Errata Sheet, correcting certain aspects of Russell’s direct testimony. Neither Russell’s hearing testimony, nor the errata sheet, mentioned Russell’s relationship with Nelson Mullins.
- On June 6, 2005, Russell resigned his position with NuVox as Vice President, Legal and Regulatory Affairs.
- On June 14, 2005, counsel for NuVox wrote counsel for BellSouth to inform him of Russell’s resignation and of his employment with Nelson Mullins. Counsel for NuVox also stated that “As of the date of the hearing in this Docket, Mr. Russell had performed work on behalf of certain clients of Nelson Mullins. However, Mr. Russell was also working on certain projects for NuVox during that time in order to complete those projects on or before June 6, 2005, and remained Vice President of Legal Affairs for NuVox through that date.” Letter from John J. Pringle to Patrick W. Turner, June 14, 2005. Counsel for NuVox also represented that “Mr. Russell has never performed any work on behalf of BellSouth Telecommunications, Inc. or any of its parent companies, affiliates, or subsidiaries.” *Id.* BellSouth filed its Motion to Strike Russell’s testimony on the same day.
- On June 21, 2005, the Commission designated Charles L.A. Terreni as a hearing officer in this matter. In this capacity, the Hearing Officer reviewed briefs and heard oral arguments from the parties on June 29, 2005. On July 20, 2005, the Hearing Officer granted BellSouth’s motion to strike Russell’s testimony. In the Order, the Hearing Officer gave the Joint Petitioners fifteen days to prefile new testimony and exhibits for the limited purpose of testifying as to those matters addressed in the stricken testimony.
- On August 5, 2005, the Joint Petitioners filed two pages of supplemental testimony given by Russell, and requested that the new filing be appended to Russell’s earlier prefiled rebuttal and hearing testimony, and that the collective

testimony be entered into the final record in arbitration. In this new filing, Russell did not explicitly readopt his prior testimony.

- On August 10, 2005, BellSouth objected to the introduction of Russell's testimony, essentially renewing its motion to strike Russell's testimony, continuing to assert that he has a conflict of interest which prevents NuVox's introduction of his testimony.
- On August 15, 2005, the Commission received a letter dated August 11, 2005, from Hamilton E. Russell requesting that his testimony be withdrawn. Russell's letter was accompanied by a letter from Kenneth L. Millwood, Esquire, of Nelson Mullins, who also requested the withdrawal of Russell's testimony. Both Russell and Millwood cited a commitment made to BellSouth and NuVox (one of the Joint Petitioners who is also a client of Nelson Mullins) that Russell would not testify other than by "subpoena and deposition".
- On August 23, 2005, the Joint Petitioners responded to BellSouth, Russell, and Millwood. In their response, the Joint Petitioners assert that Russell does not have a conflict of interest which prevents him from testifying, and that neither Russell nor Millwood have the authority to withdraw his testimony, which was prefiled by the Joint Petitioners. The Joint Petitioners urged the Commission to accept Russell's testimony and dispense with further cross-examination.
- On August 26, 2005, BellSouth countered that the Joint Petitioners' submission of Russell's testimony was contrary to the terms of the June 21, 2005, Order which allowed them to submit new testimony. BellSouth argues that the June 21st Order did not give the Joint Petitioners the option of requesting reinstatement of Russell's stricken testimony. BellSouth asked the Commission to accept Russell's withdrawal of his prefiled testimony, rendering BellSouth's objection to that testimony moot. BellSouth also asked the Commission to close the proceedings and order the parties to submit prehearing briefs without any further testimony from the Joint Petitioners. In the alternative, BellSouth suggested that the Commission could order the Joint Petitioners to introduce the testimony of a different witness whom they presented in parallel arbitration proceedings which were recently held in Mississippi.
- On September 9, 2005, the Hearing Officer denied BellSouth's second motion to strike Russell's testimony. He also denied Russell and Millwood's requests to withdraw the newly prefiled rebuttal testimony, and ordered BellSouth to file surrebuttal testimony within ten days of receiving the Order. The Hearing Officer stated that after receipt of the prefiled testimony, the Commission would hold a hearing to consider the newly filed testimony, hear cross-examinations, and make such rulings as necessary.

- On September 16, 2005, BellSouth moved to overrule the Hearing Officer's motion. After BellSouth filed its appeal, both BellSouth and the Joint Petitioners asked the Commission to decide the "conflict of interest" issue, in lieu of BellSouth's appeal.

### DISCUSSION

The Hearing Officer's Order of July 20, 2005, required the Joint Petitioners to resubmit testimony in order to cure the prejudice caused to BellSouth by Mr. Russell's failure to disclose his employment with Nelson Mullins. The Hearing Officer contemplated that when the Joint Petitioners offered their new testimony BellSouth could raise appropriate objections, including ones based on Russell's employment (while not required to call Russell as a witness again, the Joint Petitioners had the option to do so). In response to this ruling, the Joint Petitioners prefiled additional testimony by Russell in which he disclosed his employment with Nelson Mullins, and they requested that it be appended to his previously prefiled rebuttal testimony.

At this juncture, BellSouth has yet to object to any specific portion of Russell's testimony, instead it has sought to strike Russell's prefiled testimony in its entirety. The Commission agrees with the Hearing Officer that BellSouth's motion to strike Russell's testimony must be denied. An attorney may be called to testify as a fact witness in a proceeding. Orangeburg Sausage Company v. Cincinnati Insurance Company, 316 S.C. 331, 347, 450 S.E.2d 66, 75 (Ct. App. 1994). Therefore, there is no absolute bar against Russell taking the witness stand in these proceedings. Even, BellSouth has admitted during these proceedings, that Russell can testify as to factual matters. Therefore, it would be inappropriate to strike his testimony altogether. Foster v. South Carolina

Department of Highways and Public Transportation, 306 S.C. 519, 523, 413 S.E.2d 31, 33 (1992).

The Commission also agrees with the Hearing Officer that objections to prefiled testimony must be made when the testimony is introduced at the hearing. While Russell's testimony has been prefiled, it has yet to be introduced in the record of this case. Public Service Comm. Reg. 103-869(C). Therefore, if BellSouth has objections to portions of his testimony, on the grounds that they result in a violation of his duty of loyalty or otherwise, those objections are not ripe at this time. However, in order to facilitate matters, the Commission will treat the parties' request for resolution of the conflict of interest issue as a motion *in limine*, and it will seek to offer guidance in this order on how it may resolve motions to exclude testimony if and when they are made.

The Commission agrees with the Joint Petitioners that Russell may testify as to matters of fact that he witnessed as an employee of the company. Orangeburg Sausage Co. v. Cincinnati Insurance Company, *supra*. However, the Commission agrees with BellSouth that, to the extent Russell's testimony seeks to advocate or advance a position for the Joint Petitioners, it is subject to exclusion. The Commission believes that such evidence would be objectionable as inappropriate opinion testimony as to conclusions of law. S.C.R.E. Rule 704, *see* Shields v. S.C. Dept. of Highways, 303 S.C. 439, 447, 401 S.E.2d 185 (1991). The Commission also agrees that, under these circumstances, to the extent Russell gives testimony which seeks to advocate a position, such testimony would

also appear to conflict with his duty of loyalty to BellSouth, and that BellSouth could also object to the testimony on those grounds. S.C.A.C.R. 407, Rules 1.7, 1.10.<sup>3</sup>

As the Hearing Officer ruled, BellSouth is free to raise specific objections to Russell's testimony, citing to evidentiary rules or asserting a conflict of interest, at the time of its introduction. The Joint Petitioners can respond accordingly at the time. Absent an objection to a specific portion of Russell's testimony, the Commission cannot offer further guidance in this matter. The Commission may not, on its own, attempt to parse Russell's testimony separating objectionable advocacy from permissible factual testimony.

The Commission also disagrees with BellSouth that the Hearing Officer erred in ruling that Russell and Kenneth Millwood, on behalf of his law firm, Nelson Mullins, did not have standing to request withdrawal of his prefiled testimony. Neither of these individuals introduced the evidence in question; instead, it was offered by the Joint Petitioners, who objected to the request for its withdrawal. Also, neither of the individuals sought to intervene in the case, even if for the limited purpose of moving to exclude evidence. Nevertheless, even if the Commission were to consider Russell and Nelson Mullin's requests, it would decline them for the following reasons. First, the Commission notes that Russell's testimony has not been introduced, so there is no testimony to withdraw from the record. Second, contrary to BellSouth's assertions, neither Russell nor Nelson Mullins has sought withdrawal of the testimony because they

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<sup>3</sup> The Commission is mindful that the interpretation of the Rules of Professional Conduct and the discipline of lawyers is a matter within the province of the South Carolina Supreme Court. However, the Commission may rule on an evidentiary objection which is based on a threatened violation of the Rules of Professional Conduct.

perceive a conflict of interest, or even the appearance of a conflict of interest. Nelson Mullins specifically declined to take a position as to whether Russell has a conflict of interest which would prohibit him from testifying in this matter. Instead, both Russell and his firm cited to an agreement Nelson Mullins had made with BellSouth and NuVox regarding Russell's testimony. Letters of Russell and Millwood to the Commission, both dated August 11, 2005. Therefore, neither of these parties raised any evidentiary grounds for withdrawal of the testimony. The Commission therefore holds that the Hearing Officer properly denied Messrs. Russell and Millwood's requests to withdraw Russell's testimony.

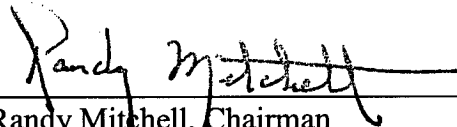
IT IS THEREFORE ORDERED THAT:

1. BellSouth's motion to overrule the Hearing Officer is denied.
2. BellSouth shall prefile supplemental testimony within ten (10) days of receipt of this Order.
3. A hearing shall be set in this matter for the Commission to receive testimony, hearing arguments, and rule on evidentiary and procedural matters as necessary.



4. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

  
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Randy Mitchell, Chairman

ATTEST:

  
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G. O'Neal Hamilton, Vice Chairman